the court, in effect, discredited that certificate as *prima facie* evidence of the facts stated, cannot be entertained. No one of the requests for instructions submitted by defendant covers the precise point now made, nor was any exception taken, at the time, to that part of the charge which, it is claimed, refers to the certificate of the attending physician. The only exception taken by the defendant to the charge was "to the charge of the eighth proposition, as modified by the court and embraced in his general charge." The eighth proposition submitted by the defendant was given, in the words already quoted from the charge, with the modification, that the jury were to determine, on the evidence, whether the insured had had the before-mentioned attacks of malarial fever, accompanied by cerebral engorgement. That modification was entirely proper, since it was the province of the jury to determine the weight of the evidence. *Cushman* v. *U. S. Life Ins. Co.*, 70 N. Y. 77. If the subsequent part of the charge, which is now referred to as discrediting Dr. Baner's certificate as evidence of the facts stated in it, was regarded at the trial as a modification of the defendant's eighth proposition, or as objectionable in itself, the exception taken should have been more specific. The attention of the court should have been called to the particular point by something more definite than the general exception taken. *Beckwith* v. *Bean*, 98 U. S. 284; *Lincoln* v. *Clafin*, 7 Wall. 132; *McNitt* v. *Turner*, 16 Id. 362; *Beavar* v. *Taylor*, 93 U. S. 46.

No error was committed in overruling the instructions asked by the defendant, since whatever they contained that ought to have been approved, was embodied in the charge to the jury.

We find no error in the record of which this court can take cognizance, and the judgment must be

Affirmed.

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*Supreme Judicial Court of Massachusetts.*

COMMONWEALTH v. POMPHRET.

If a club of men *bona fide* buy and own in common a stock of liquors, to be delivered by their steward only to actual members upon receipt of checks previously obtained from him at five cents each, such a delivery to a member for such checks, *bona fide* made, is not an illegal sale by such steward, and he is not indictable for unlawfully keeping liquors with intent to sell.

THIS was a complaint for unlawfully keeping liquor with intent to sell. Defendant was a member of a club of about one hundred

and fifty persons, which was organized several weeks before the seizure, for the purpose of furnishing its members with refreshments. The club had the usual officers, and employed defendant as steward, paying a certain sum per month for his services and for the use of the room where the liquors were found. Each member upon joining the club paid an admission fee of one dollar, and received certificate of membership. The money so obtained was used in buying a variety of liquors in the name and as the property of the club. Checks were printed, each representing five cents, and the steward was required to furnish these checks to members in such numbers as they were called for, at the rate of five cents each. The steward took care of the liquors of the club, delivered them to members as called for and received the price in checks. The liquors seized were the property of the club, obtained and designed to be used under the above arrangement, and were in his custody as steward.

At the trial below defendant asked the court to rule that there was no evidence to warrant a conviction. The court declined so to rule, but instructed the jury that, "if an association of persons, of whom the defendant was one, owned a quantity of intoxicating liquors which they kept under an arrangement to furnish them in such quantities as might be required, to be drunk on the premises, to such members of the association as should call for them in return for checks which represented certain designated values, and which were obtained from the defendant as a steward of the association, and were paid for, when obtained, at a price which they purported to represent, and the defendant was one of the persons keeping these liquors for said purpose, and was personally in charge of them, furnishing them in return for said checks, the jury may find that said liquors were kept by him for unlawful sale."

A verdict of guilty was returned, and with defendant's consent the case reported to this court.

*Edgar J. Sherman*, Atty.-Gen., for the Commonwealth.

*J. B. Carroll*, for defendant.

FIELD, J.—The instructions given in their application to the facts in evidence do not seem to us to differ materially from the instructions which were held erroneous in *Commonwealth* v.

*Smith*, 102 Mass. 144, except, in that case, the court below ruled that the facts supposed "would be a sale by the defendant," and in this case the court ruled that from the facts supposed "the jury may find that said liquors were kept by" the defendant "for unlawful sale." This change in the ruling may have been made for the purpose of meeting the suggestion found in the opinion in *Commonwealth* v. *Smith*, that the arrangement described "may have been a mere evasion of the law" which "would be a question not of law but fact, and would fall wholly within the province of the jury."

The legislature within the limitations of the constitution can prohibit, under a penalty, any acts it sees fit. The meaning of the statutes must be determined by construction, and criminal statutes are to be construed strictly, although the whole scope of the statutes must undoubtedly be considered. The legislature by the Pub. Sts. c. 100, sect. 1, has prohibited the "selling, or exposing or keeping for sale spirituous or intoxicating liquors," except as authorized in that chapter. It has not undertaken to prohibit the drinking or buying of intoxicating liquors; or the distribution of it in severalty among persons who own it in common. If, therefore, two or more persons unite in buying intoxicating liquor, and then distribute it among themselves they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statutes, they still act with impunity, because what they do is not prohibited by the statute. The evasion of the law intended in *Commonwealth* v. *Smith*, is an evasion by means of a form or device which is apparently legal, while the substance of what is done is within the prohibition of the statute.

In that opinion it is said, "If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some other person than the defendant, and if he merely kept the liquors for them and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion, and the substance of the whole transaction were a lending of money to the

defendant that he might buy intoxicating liquors to be afterwards sold and charged to his associates, or if he was authorized to sell or did sell or keep any of the liquors with intent to sell to any persons not members of the club, he might well be convicted." The previously arranged system referred to was similar in many respects to that in the case at bar.

The word "club" has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy; and the sale of what might be called a temporary membership in the club with a sale of the liquors would not substantially change the character of the transaction. One inquiry always is whether the organization is *bona fide*, a club with limited membership into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common with the mutual rights and obligations which belong to such common ownership under the constitution and rules of the club; or whether, either the form of a club has been adopted for other purposes with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create or a mere name has been assumed without any real organization behind it.

The decisions of other courts which are pertinent, undoubtedly turn more or less upon the particular language of the statute construed. *Gruff* v. *Davis*, 8 Q. B. D. 375, was decided on the ground that there was no transfer of the general or absolute property, but a transfer of a special interest, as all the members of the club were owners in common, and that as the club was *bona fide* a club, the furnishing of liquors to a member was not a sale within the meaning of the English Licensing Act of 1872. *Sein* v. *State*,

55 Md. 567, was decided upon the same general ground. In *Richart* v. *People*, 79 Ill. 85, the court say that "The whole thing is a subtle artifice planned with a view to avoid the penalties denounced against persons violating the law." "The proposition is absurd that the ticket-holders really owned the liquors with which the bar was stocked." The court also say that if the theory of the defence were adopted, "the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members or partners at retail, without a license to keep a dram shop, than a mere stranger would have." "But the alleged association is a mere fiction." "The statute makes the giving away of intoxicating liquors, or other shift or device to evade its provisions unlawful selling." "It was a question of fact whether the association was a mere shift or device to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached." In *Marmont* v. *State*, 48 Ind. 21, it was distinctly decided that the delivery by the club or society through its agents, of beer which was the common property of the society, to a member of the society, upon credit or for cash, and which thereby became the separate property of the members was a sale within the meaning of the Indiana statute of 1873. *State* v. *Mercer*, 32 Iowa 405 resembles *Marmont* v. *State*. To the same effect is *Martin* v. *State*, 59 Ala. 34.

The decision in the case at bar is not to be governed wholly by any general definition of the words "sale" or "selling." After the decision in *Commonwealth* v. *Smith*, the St. of 1875, ch. 99 was passed, which is the foundation of those provisions in the Pub. Sts., c. 100, under which this complaint was made. Nothing is contained in that act or in any subsequent acts which in terms relates to clubs until the St. of 1881, c. 226, was passed. The provisions of the public statutes prohibiting the selling or exposing or keeping for sale of spirituous or intoxicating liquors, except those derived from St. 1881, c. 226, are similar to those contained in St. 1868, c. 141, which were construed in *Commonwealth* v. *Smith*. The statute of 1881, c. 226, is perhaps broader in its terms than was necessary to accomplish its apparent purpose, because no doubt has been expressed that a selling of intoxicating liquors by a club to persons who are not members is an illegal sale under other statutes unless the club is duly licensed to make the sale. The in-

tention of this statute, however, plainly is to distinguish between clubs in those cities and towns whose inhabitants vote to grant licenses, and clubs in those whose inhabitants vote not to grant licenses, and unlicensed clubs in the former cities and towns are left to be dealt with under other statutes. It must be assumed that the decision in *Commonwealth* v. *Smith* was known to the legislature at the time the existing statutes were passed. The inference is, that the legislature intended that unlicensed clubs in cities and towns whose inhabitants vote to grant licenses must be dealt with according to the construction given by this court to statutory provisions similar to those in existing statutes prohibiting the sale, exposing or keeping for sale of intoxicating liquors.

The ruling and instruction in this case seems to us to assume that this was *bona fide* a club; that the liquors were owned in common by the members; that they were furnished only to members; and that they were kept by the defendant as one of the members and as steward of the association. It does not appear in the exceptions in what manner new members were admitted, except that they paid an admission fee of one dollar, but we cannot assume that any person could join the association at his pleasure, and the ruling and instruction are not put upon the ground that there was evidence that this was an association open to everybody at a price. On the assumption upon which we understand the instructions proceed we think that under the decision in *Commonwealth* v. *Smith* it was not competent for the jury to find the defendant guilty.

New trial granted.